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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LUCIANA BAKER, **Plaintiff,** **v.** **THE HARTFORD LIFE INSURANCE COMPANY and BLOOMBERG, LP – NEW YORK, ADMINISTRATOR OF THE BLOOMBERG LP LONG-TERM DISABILITY PLAN** **Defendants.**	**Electronically Filed** **CIVIL ACTION NO. 3:08-cv-6382 (FLW) (TJB)** **Motion Date: October 19, 2009**

STATEMENT OF UNCONTESTED MATERIAL FACTS

1. Plaintiff worked as a journalist/reporter for Bloomberg, LP ("Bloomberg") from January 24, 2000 to February 2, 2007. HLI00039.[1]

2. Plaintiff was a participant in the Group Long Term Disability Insurance Plan for Bloomberg's employees ("Plan"), which provided LTD benefits to eligible and qualified employees through Hartford Group Policy No. 83171440 ("Policy"), which is governed by ERISA. HLI00001-35.

3. Under the Policy,

> *Disability* means that during the *Elimination Period* and the following 24 months, *Injury* or *Sickness* causes physical or mental impairment to such a degree of severity that *You* are:
>
> 1) continuously unable to perform the *Material and Substantial Duties* of *Your Regular Occupation*; and
>
> 2. *not Gainfully Employed*.

HLI00007.

4. In order to obtain LTD benefits participants are required to submit "[o]bjective medical findings which support" the claim of disability including "tests, procedures, or clinical examinations standardly accepted in the practice of medicine …." HLI00014.

5. Bloomberg has discretionary authority to eligibility for and entitlement to benefits and it delegated that authority to Hartford. HLI0020.

6. On February 7, 2007, plaintiff underwent an MRI which showed disc bulging and an annular tear in her lumbar spine, as well as some nerve root compression. HLI00274.

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[1] Hartford will refer to documents in the Administrative Record which was filed under seal (Dkt. 21) on September 24, 2009 by the Bates labels that have been assigned to them.

7. By February 15, 2007, plaintiff had ceased working due to her back condition. because plaintiff's primary treating physician, Paul M. Cooke, M.D., a physiatrist, diagnosed plaintiff with chronic low back pain and disc disease with acute exacerbation and he reported that plaintiff suffered from low back pain with prolonged sitting and bending and that she had a reduced lumbar range of motion. HLI00309.

8. Plaintiff applied for short-term disability ("STD") benefits. and when asked to identify her allegedly disabling condition plaintiff wrote "I can not sit down at work due to spinal-related diseases." HLI00293.

9. Dr. Cooke confirmed her condition and reported that he expected her to return to work full-time by May 1, 2007. HLI00294.

10. In April 2007 he extended that period until July 2007 to permit plaintiff to "continue [her] spine strengthening exercise program." HLI00297.

11. Plaintiff became very active after she discontinued working and was "participating in an exercise class five days per week and [did] her home exercise program on a daily basis …." and was undergoing acupuncture treatment. HLI00274.

12. Although plaintiff had occasional pain, she did "not require[] any regular pain medication." HLI00271.

13. In April 2007 Dr. Cooke extended that period until July 2007 to permit plaintiff to "continue [her] spine strengthening exercise program." HLI00297.

14. Plaintiff's condition improved as the result of her exercise regimen and by April 2007 Dr. Cooke described her as "significantly improved" from February and he predicted that she would return to work within three (3) months, "likely initially in a modified capacity" that did not require extensive sitting. HLI00275.

15. Dr. Cooke saw plaintiff again on July 12, 2007 and described her condition as "symptomatically and functionally improved low back pain secondary to L4-5 and L5-S1 degenerative disk disease post L5-S1 microdiskectomy." HLI00271.

16. Dr. Cooke believed that, for the most part, plaintiff was "doing very well" because she had limited her prolonged sitting and, in fact, plaintiff advised Dr. Cooke that her "low back has not felt this good in some time." HLI00271.

17. When they discussed her returning to work, however, plaintiff told Dr. Cooke that her job required "prolonged sitting." HLI00271.

18. Based on that representation Dr. Cooke reported that "it is not medically advisable for her to return to work in her previous position which does require prolonged sitting." HLI00271-272.

19. Dr. Cooke suggested that plaintiff should explore LTD benefits if she had "no other employment option that would not require that degree of sitting." HLI00272.

20. In connection with plaintiff's application for leave under the Family and Medical Leave Act Dr. Cooke had similarly rejected the idea that plaintiff was "unable to perform work of any kind." HLI00291.

21. Contrary to the limited restrictions Dr. Cooke had imposed, however, plaintiff had determined not later than July 9, 2007, that she would "not be able to rtw [return to work] in any capacity and will need LTD." HLI00284

22. Bloomberg was able to accommodate plaintiff's sitting restrictions and on August 3, 2007, Bloomberg advised Hartford that plaintiff's "work station can be modified to allow her to alternate between sitting and standing as needed." HLI00268.

23. On August 13, 2007, Dr. Cooke confirmed that the only restrictions on plaintiff's activities were that she should limit prolonged sitting and should avoid lifting anything greater than twenty (20) pounds and that both of these limitations could be accommodated by Bloomberg. HLI00229-231.

24. Despite the fact that (1) Dr. Cooke agreed plaintiff could work within certain restrictions, and (2) Bloomberg was able to accommodate those restrictions, plaintiff applied for LTD benefits on August 29, 2007. HLI00213-221.

25. Plaintiff received Short-Term Disability ("STD") benefits from Hartford for the maximum payable period and those benefits ceased on August 12, 2007. HLI00264.

26. Plaintiff's claim for LTD benefits was based entirely on the symptoms she claimed to have experienced as the result of her back. HLI00214-218.

27. Plaintiff wrote that she could not sit for longer than twenty (20) minutes at a time without numbness, tingling, cold and pain in her lower back. HLI00215.

28. Plaintiff emphasized that she had "minimized [her] sitting time since [she] went on disability and feel MUCH BETTER healthwise." HLI00215 (emphasis in original).

29. In addition to Dr. Cooke and his partners, plaintiff wrote that she had treated with Dr. Keyan Ma and Dr. Wang Chung Hsueh, both of whom were acupuncturists. HLI00215.[2]

30. In fact, despite plaintiff's repeated complaints of severe pain with prolonged sitting, she advised that she had been treating with Dr. Wang in Rio de Janeiro, Brazil, since 2002 and that he had helped her "TREMENDOUSLY." HLI00215 (emphasis in original).[3]

31. Plaintiff also had Dr. Cooke complete an Attending Physician's Statement of Disability ("APS") on August 28, 2007 and Dr. Cooke noted plaintiff's primary diagnosis was lumbar disc disease and her secondary diagnosis was chronic low back pain. HLI00219.

32. Consistent with his treatment records Dr. Cooke advised Hartford that plaintiff could work for ten (10) hours a day, and that she could sit for one half (1/2) hour at a time for a total of four (4) hours per day, stand for one (1) hour at a time for a total of four (4) hours per day, and walk for one (1) hour at a time for a total of two (2) hours per day. HLI00219-220.

33. Plaintiff's application for LTD benefits established the following things:

(a) plaintiff claimed to be disabled as the result of her back condition;

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[2] Dr. Wang Chung Hsueh is referred to alternatively as Dr. Wang and Dr. Wang throughout the administrative record. For consistency he will be referred to as Dr. Wang throughout this brief.

[3] The record is silent as to how plaintiff traveled from New Jersey to Rio de Janeiro, Brazil, while maintaining her self-described sitting limitations.

(b) Dr. Cooke confirmed that plaintiff could work full-time provided that she could avoid prolonged sitting; and

(c) Bloomberg confirmed that plaintiff's job could be modified so that she could avoid prolonged sitting.

34. In light of this information, Hartford denied plaintiff's application for LTD benefits on September 14, 2007. HLI00190-193.

35. Although plaintiff may be unable to engage in prolonged sitting, Bloomberg had made clear that neither was a material or substantial duty of her occupation. HLI00268.

36. As a result, plaintiff was not disabled under the terms of the Policy. HLI00193.

37. On January 16, 2008, plaintiff, through counsel, appealed Hartford's denial of her claim for LTD benefits. HLI00156-189.

38. In this appeal plaintiff attempted to paint a radically different picture of her allegedly disabling condition from the one she had presented previously and included two records from visits with Gary A. Fantini, M.D., F.A.C.S., a vascular surgeon. HLI00167-168.

39. While Dr. Fantini indicated that plaintiff had bilateral foot discoloration in February 2006, approximately one year before plaintiff discontinued working, this was likely the result of varicose vein disease, he made no specific recommendations for treatment and he did not indicate the condition was disabling in any way. HLI00168-169.

40. Plaintiff did not see Dr. Fantini again until September 21, 2007, after her LTD application had been denied. HLI00167.

41. At that time Dr. Fantini reported that plaintiff was living primarily in Rio de Janeiro, Brazil, where she engaged in a daily three (3) hour exercise regimen, including spinning, which she indicated provided excellent relief of her symptoms. HLI00167.

42. Plaintiff also submitted a letter dated September 25, 2007, from Dr. Ma, one of her acupuncturists. HLI00171-157.

43. As with Dr. Fantini, plaintiff returned to see Dr. Ma after an extended absence when Hartford denied her application for LTD benefits. HLI00173-175

44. Dr. Ma reported on plaintiff's history and provided a list of diagnoses related to her cervical and lumbar condition that were different from those provided by her treating primary treating physician, Dr. Cook. HLI00172.

45. Although Dr. Ma concluded plaintiff was unable to return to work, he based this conclusion on his assumption that plaintiff "has to stay sedentarily (sic,) during [her] work." HLI00172.

46. Dr. Ma was apparently unaware that Bloomberg had agreed to accommodate the sitting restrictions imposed by plaintiff's physicians. HLI00172.

47. Dr. Ma did not offer any opinion as to whether plaintiff could work without prolonged sitting. HLI00172.

48. Plaintiff also submitted a letter regarding her September 28, 2007, visit to a neurologist, Steve J. Busono, M.D. HLI00177.

49. Within one (1) week of Hartford's denial of her benefits, plaintiff had claimed that she had begun to experience "difficulty in urination as well as blood in the urine." HLI00177.

50. Dr. Busono had advised plaintiff that she had to go to the hospital, but she insisted on seeing her primary care physician first. HLI00177.

51. Dr. Busono did not suggest that these conditions limited plaintiff's ability to work in any way. HLI00177.

52. Plaintiff also submitted a letter from a new physician, Nataliya Dashevsky, M.D. HLI00179.

53. Although Dr. Dashevsky did not include any treatment records, she opined in a conclusory fashion that a 2001 surgery had left plaintiff with a neurogenic bladder characterized by frequent bouts of urinary retention and urinary track infections, and which was exacerbated by sitting for "long periods of time." HLI00179.

54. Dr. Dashevsky's letter did not indicate, however, whether anything had changed regarding her bladder condition between 2001 (when she allegedly developed it) and 2007 (when she discontinued working) that had rendered her disabled. HLI00179.

55. Dr. Dashevsky also asserted that plaintiff had a history of vascular insufficiency of the arteries in both legs, which was neurogenic and due to episodes of "prolonged sitting." HLI00179.

56. As with plaintiff's bladder condition, there were no records provided regarding her "history of vascular insufficiency" and no explanation as to why this condition had never been claimed as disabling previously. HLI00179.

57. Dr. Dashevsky did not suggest that either condition limited plaintiff's ability to work in any way within the accommodations provided by Bloomberg. HLI00179.

58. Plaintiff also submitted a letter from Marc I. Schwarzman, M.D., a urologist, whom she went to see after Hartford denied her claim for LTD benefits. HLI00181.

59. Dr. Schwarzman noted that while the etiology of plaintiff's urinary symptoms was unclear, it was not related to her 2001 surgery. HLI00181.

60. At plaintiff's request Dr. Schwarzman had instructed her on self-catheterization in the event she had "another episode of severe urinary hesitancy." HLI00181.

61. As with Dr. Busono, Dr. Schwarzman did not indicate that this condition limited plaintiff's ability to work in any way. HLI00181.

62. Plaintiff also submitted a letter without supporting medical records from her Brazilian acupuncturist Dr. Wang. HLI00183.

63. Dr. Wang reported that he had treated plaintiff since August 2002 and offered his opinion that plaintiff suffered from chronic low back pain, vascular insufficiency of the arteries in both legs and a neurogenic bladder resulting from complications of her April, 2001 spinal surgery. HLI00183.

64. Unlike her treating physiatrist, urologist, and neurologist, Dr. Wang opined that plaintiff was precluded from sedentary level work because prolonged sitting and standing exacerbated her medical problems. HLI00183.

65. Finally, plaintiff submitted a photograph of her workstation to support her assertion that her job could not be modified to accommodate her conditions, HLI00185, a claim that had been flatly rejected by her employer. HLI00268.

66. As part of its independent review of plaintiff's claim on appeal, Hartford obtained an independent medical review ("IMR") from John G. Nemunaitis, Jr., M.D., who is Board Certified in Internal Medicine. HLI00145.

67. In addition to reviewing plaintiff's medical records, Dr. Nemunaitis contacted Drs. Ma, Dashevsky, and Cooke. HLI00145.

68. While Dr. Ma refused to speak with Dr. Nemunaitis because he did not have plaintiff's approval to do so, HLI00145, but provided valuable information regarding plaintiff's level of functionality. HLI00145.

69. Dr. Dashevsky confirmed that plaintiff "is functioning at a sedentary work capacity" but she believed that plaintiff was limited to sitting for twenty (20) minutes at a time. HLI00146.

70. Dr. Dashevsky expressed her understanding (presumably based on representations by plaintiff) that plaintiff's "job could [not] be modified to meet her needs." HLI00146.

71. Dr. Dashevsky concluded that this restriction would preclude plaintiff from working. HLI00145.

72. Dr. Nemunaitis also spoke with Dr. Cooke who confirmed that plaintiff was functioning at a sedentary work capacity. HLI00145.

73. Based on his extended treatment of plaintiff, he believed she could work with a job modification that limited her sitting to thirty (30) minutes at a time. HLI00145.

74. On February 26, 2008, Dr. Nemunaitis provided his report to Hartford. HLI00145-146.

75. After outlining plaintiff's medical history and the contents of his conversations with plaintiff's treating physicians, Dr. Nemunaitis agreed with Dr. Cooke that plaintiff was able to work. HLI00145.

76. In fact, their only area of substantial disagreement related to the restrictions on plaintiff's ability to sit. HLI00145-146.

77. Dr. Nemunaitis concluded that, although plaintiff had provided subjective complaints of pain, the objective evidence (such as MRIs) did not support a limitation on her ability to sit. HLI00146-147.[4]

78. In light of all that evidence, on March 17, 2008, Hartford upheld its decision to deny LTD benefits to plaintiff under the terms of the Policy. HLI00141-142.

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[4] As noted above, the Policy requires that a participant submit objective medical findings in support of disability. HLI00014.

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